2000

State of Utah v. Suzanne Nebeker : Brief of Appellee

Utah Court of Appeals

Craig C. Halls; Grand County Attorney Pro Tem; Attorney for Appellee.
C. Robert Collins; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. SUZANNE NEBEKER, Defendant/Appellant.	)	APPELLEE'S REPLY BRIEF Court of Appeals 20000160CA

APPEAL FROM

The Seventh District Court
In and for Grand County
Honorable Lyle R. Anderson

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STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction in this matter pursuant to Utah Code Annotated §78-2a-3(d) if the matters appealed from are interlocutory in nature or (e) if the matters appealed from are a final judgment or order.

STATEMENT OF ISSUES PRESENTED

Appellant appeals from an order in which the trial court denied a motion to dismiss an Amended Information which was filed after the trial court declared a mistrial because the defendant had claimed that they were surprised by the prosecutor's election to include two incidents of claimed child abuse in the same information. The issues raised are:

1. Whether the bringing of the second information after a mistrial is barred on double jeopardy grounds;

2. Whether the trial court erred in refusing to dismiss the amended information due to the prosecutor's notification to defendant that there existed a video tape and that the defendant could make arrangements to view or copy the video tape; and

3. Whether the prosecutor filing of an amended information after a mistrial and gaining an additional count and embodying two incidents as had previously been embodied in one count as two separate counts constitutes prosecutorial vindictiveness.

STANDARD OF APPELLATE REVIEW

In this case there are questions of law. Questions of law are reviewed for correctness. *State v. Layva*, 951 P.2d 738, 739-743 (Utah 1997). An issue which is part of and important to the double jeopardy issue is whether or not the defendant acquiesced in, agreed to or in some way helped initiate the mistrial, thereby waiving the defense of a bar on double jeopardy grounds. This is a question of fact which the court reviews for an abuse of discretion. *Toone v. Toone,* 952 P.2d 112, 114 (Utah App. 1998) (quoting *Hill v. Hill,* 841 P.2d 721, 724 (Utah App. 1992)). The trial court's decision on a question of fact is entitled to a presumption of validity (*Ruhsam v. Ruhsam,* 742 P.2d 123, 124 (Utah App. 1987)).

ISSUES PRESENTED ON APPEAL

A. Where the trial court declared a mistrial with the knowledge, consent and on the insistence of the defendant, is the prosecution of the same offense on an amended information precluded on double jeopardy grounds?

B. Does the prosecutor's notification to the defendant that there existed a video tape interview of the victim and the indication that the defendant could obtain a copy of the tape by making arrangements for the appropriate costs violate the Utah State Constitution or constitute prosecutorial misconduct for failure to provide discovery?

C. Does the prosecutor's filing of a two-count information for child abuse based upon two incidents approximately eight days apart constitute prosecutorial vindictiveness, where the original one-count information embodying both incidents as one abuse did not result in a verdict where a mistrial was declared?

D. Has the Defendant preserved a due process claim where she only stated in her Motion to Dismiss on "constitutional grounds".

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Judge Lyle R. Anderson declared a mistrial in the Seventh Judicial District Court on December 17, 1999, when the defendant, through her counsel, indicated that she was surprised by the way the prosecution was intending to proceed, in that the prosecutor had elected to consolidate two incidents, one occurring on November 28, 1998 and the second occurring on December 6, 1998, into one count of child abuse.

Defendant claimed surprise and an inability to defend. The defendant requested a mistrial and the Court declared such mistrial.

The State then refiled the action alleging two counts of physical abuse of a child; a separate count for each incident - one occurring on November 28, 1998 and the other on December 6, 1998.

The defendant filed a motion to dismiss the amended information based upon "constitutional grounds", double jeopardy, prosecutorial vindictiveness and failure to provide adequate discovery".

This is an appeal from the Seventh Judicial District Court's denial of a Motion to Dismiss.

B. COURSE OF PROCEEDINGS

On December 17, 1999, Suzanne Nebeker was brought to trial on the charge of child abuse. The prosecutor notified the court that the one count covered two incidents, beginning on November 28, 1998 and continuing until December 6, 1998. The charging document indicated that the abuse occurred on or about the 28th day of November, 1998.

Counsel for defendant indicated he had been prepared to proceed on an incident occurring on November 28, a Sunday, just before the victim moved out of the home. This understanding actually combines both events. November 28, 1998, was the Saturday following Thanksgiving, and "Sunday" (December 6) is

the concluding date, to which the prosecutor referred as being a continuation of the same event or events. The defense asserted that they had been surprised by this action, had not had an opportunity to prepare and requested that the Court grant the defendant a mistrial.

Following a noon recess and a detailed questioning of Defendant and her counsel as to their desire for a mistrial, the Court granted a mistrial. The prosecutor later filed a two-count amended information separating the two incidents. Defendant claimed filing of the amended information was double jeopardy. Defendant claimed at trial that the prosecution failed to provide transcripts of video taped interviews and this was a reason that the defendant was compelled to request a mistrial. Finally, the defendant claims that because the prosecutor filed the incidents as one count in the original information, and now had separated the incidents into two counts, that this action constituted prosecutorial vindictiveness.

It is from the Court's denial of the Motion to Dismiss on the foregoing grounds that this appeal is taken.

STATEMENT OF FACTS

This matter proceeded on a one-count information for child abuse pursuant to Utah Code Annotated §78-5-109(3)(a) alleging that the defendant had intentionally or knowingly inflicted injury upon a child on or about November 28, 1998 (Court File Page 1 (CF 1)). Although the Defendant initially represented herself and filed some pleadings (Per se pleadings were prepared by Defendant's counsel) (Transcript 147-148), she was represented by counsel at the trial of the matter on December 17, 1999. (Notice of Appearance, CF 28)

A jury was empaneled and seated, but prior to opening arguments, the Prosecutor requested a side bar with the Judge. A partial transcript of that side bar was transcribed by Defendant's counsel and appears to be an accurate representation of what occurred. (CF 81) During the side bar the Prosecutor

stated that the original information memorialized an occurrence beginning on or about the 28th day of November, and continued until the 6th day of December, when the victim moved out of the home. It was the intent of the Prosecutor to treat the incidents of child abuse over that period of time as one incident and to only charge it as one count. Defense counsel expressed surprise and indicated to the court that he was not prepared to proceed.

The Prosecutor gave opening argument and at the closing of his opening argument objection was made by defense counsel which concerned the subject of the earlier side bar. Defense counsel also expressed his understanding of the nature of the case he was defending (Transcript p.36). Counsel had received an incident report from San Juan County Sheriff's Deputy Kelly Bradford, which indicated that the victim had been hit and kicked by her stepmother (defendant) on the Saturday following Thanksgiving. (See Exhibit D to Prosecutor's Memorandum in Opposition to Defendant's Motion to Dismiss, CF 196). The date of November 28 corresponds to the Saturday following Thanksgiving in 1998. Defense Counsel also received the Child Protective Services Report (CPS Report of Chris Veach) (Tr. 92-121, 157-182) The first entries on page 1 dated December 4, 1998, indicated that an incident had occurred on Saturday night, that her mother and her had had an argument, and that they saw marks on her (CF 92). The Report further indicated an interview which occurred on the 8th day of December, 1998, which stated that on Sunday night the Defendant had thrown a phone at her, had broken a window and that the victim had left the residence. (CF 94-95)

The reports which were in the possession of the Defendant set forth two separate dates. The knowledge of Defense Counsel as to these two incidents can be gleaned from the following statements:

> Mr. Collins:"The report given to me, Your Honor, indicate an interview on December 8, 1999[sic], with Lindsay Watson, in which she claims that abuse occurred on the 28th of November, which was a Sunday evening and that on the following day, Monday, she was - -

- ran away from home and did not return after that to the home." (Transcript 36-37)

* * *

The Court:"And I think I'm now getting a picture on this issue over whether we are trying what happened on the 28th or what happened on the 6th or what happened together. And I am getting a picture that in your mind these things got blurred because you told me when we started here that something happened on Sunday and the next day she went to school and left. That's the 6th of December. So apparently you came here prepared to address what happened on that Sunday"

Mr. Collins: I understood that was the 28th, but apparently that's not the 28th." (Transcript 116)

* * *

The Court:" . . . you said, Mr. Collins, that you're not prepared to defend the 6th, but in fact it now appears that most of what you knew about this is actually conduct on the 6th, which you thought was on the 28th, but if you still object to him trying both counts as one . . . (Transcript p.118)

* * *

Mr. Collins:"During the interview, Ms. Nebeker or Ms. Watson, talking about the witness who testified stated that she had been hit and kicked by her stepmother who is Ms. Suzanne Nebeker. This happened the Saturday after Thanksgiving, 1998. Ms. Watson left the home and was placed in shelter care. Ms. Watson is currently in foster care situation and there is a restraining order in place against Ms. Nebeker.

And then it goes on about some other things that occurred in 1999. As a result, Your Honor, it was our understanding from discovery and the case we prepared for, that what we were dealing here was with the events of the 28th of November.

The Court: I need to ask you something, Mr. Collins. You told me during the side bar conference that you were expecting to try a case about something that happened on a Sunday and that the child left the house the next day after going to school.

Mr. Collins: Correct, Your Honor.

The Court: That matches the 6th and 7th of December.

Mr. Collins: That's correct. It does now. At the time I told the Court that my understanding was the 28th was a Sunday and that she had left on a Monday, that's why I told the Court now that, that's how I understood it, that's how I, in fact, made my opening statement to the jury because based on these records, that's what it said.
Now I understand, Your Honor, that we have two counts that we are talking about.

The Court: That we have two instances.

Mr. Collins: Two instances that we are talking about. Totally different incidences and frankly I was very surprised to learn that, and the Court is correct, that now it appears that the 28th

is a Saturday, something I learned as we went through the trial and that the 6th is a Sunday, which is approximately a week later. Something I was not prepared for. Counsel has argued those incidences to the jury." (Transcript p.145-146)

* * *

Mr. Collins: " . . . I have a massive amount of information about this case . . . I can honestly tell the Court that as I came here today, and I reread all the discovery that I received from the court before coming today. In fact, I reread it this morning. Got up early. That I honestly understood that we were dealing with an incident that occurred on what I believed to be the 28th of November, a Sunday, and on the next day this child went to school, did not come home, and that the incident then moved forward from there to the CPS custody." (Transcript p.150)

* * *

Mr. Collins: "That's why when counsel stood up I was very surprised this morning. This did not seem like a difficult case to me with events that occurred on the 28th.

The Court: So what you're expecting to hear is what you heard about. What you were expecting to hear was evidence about, well, the conduct you were expecting to hear about was conduct occurring on a Sunday, followed by a child's departure from the home. And you have actually heard about that.

Mr. Collins: The following day.

The Court: But the date was not the 6th of December.

Mr. Collins: It's not quite that simple because we now have an intervening week that I have to deal about that I didn't know about. That's what I'm telling the Court. I, yes, I knew about the alleged conduct of the 6th. (Transcript p. 151).

Mr. Collins was invited by the Court to take the noon recess and determine whether he would ask for a mistrial. Upon returning from the recess, Mr. Collins requested that the Court declare a mistrial. The Court's reasoning and direct examination of the Defendant occurs in the Transcript at pages 159-161:

Ms. Nebeker: Your Honor, I have spoken with my attorney. He has given me all of the options and I think I have a fairly good understanding of, um, the facts here and, um, I feel like it, it would be at this point in my best interest to, to consider this option.

The Court: You're not just considering that your asking for it now.

Ms. Nebeker: I'm asking for it, you're correct, I am.

The Court: You could go away tonight completely exonerated and free of any further shadow and by doing by you're doing, you're

> prolonging this. It may, you think, after your, and I don't want to pry into your conversation with your attorney, but you are comfortable with this decision?
>
> Ms. Nebeker: Yes, sir.
>
> The Court: Okay. Well, that's what I'm going to do. I'm going to declare a mistrial and schedule a new trial. Mr. Halls, I'll give you a chance if you want, to file an Amended Information, to do so. Bring the jury in and I'll tell them the good news." (Transcript p. 159-161)

An Amended Information was filed separating the two incidents, alleging one count of child abuse occurring on November 28, 1998, and another instance occurring on December 6, 1998. The Amended Information was filed on January 14, 2000. (CF 53).

The Defendant filed a Motion to Dismiss the Amended Information, stating in the Motion "upon constitutional grounds" (CF 54) and in the Memorandum in Support of the Motion to Dismiss on the "ground of double jeopardy, prosecutorial vindictiveness and failure to provide adequate discovery." (CF 64)

The Court heard oral arguments on the Motion to Dismiss on February 3, 2000.

The Court made Findings of Fact (CF 227-231). The Court found that the mistrial was requested by defense counsel (Finding 1, 2 and 3; CF 227-228). The Court found that there was no bad faith on the part of the prosecutor's filing a single criminal episode on two incidents approximately a week apart.(Finding 4; CF 228).

The Court found that the prosecutor had complied in all respects with discovery and that there was no violation of discovery and no bad faith on the part of the prosecutor with regard to discovery (Finding 5; CF 228-229).

The Court found that requiring the Defendant to pay her own costs for the copying of a video tape did not constitute "compelling" advancement of money in violation of the Utah Constitution, Article I, Section 12. (Finding 6; CF 229)

The Court found that there was no vindictiveness on the part of the Prosecutor in bringing the second charge and that the Prosecutor, by virtue of evidence brought forth at the time of trial may have very well brought a tampering with evidence charge, but did not do so. (Findings 7 and 8; CF 229)

The Court found that the Prosecutor was willing to continue with the trial and that he did not evidence a motive to provoke a mistrial in order to obtain a more favorable hearing. (Findings 9, 10 and 11; CF 229)

ARGUMENT

I

DEFENDANT HAS FAILED TO PRESERVE HER DUE PROCESS ARGUMENTS

The procedural context of this appeal is that the Defendant has objected to the filing of an Amended Information after a mistrial was declared at the Defendant's request. Procedural and evidentiary matters which were part of the trial are only appropriately questioned by the Defendant as it affects the Court's ruling on whether charges could be refiled. Yet, the Defendants spends a number of pages in her brief discussing due process, and, particularly at page 21, that failure to provide certain discovery violates due process, with the emphasis in her argument that the Court's prospective allowance of the testimony of two CPS workers constitutes a violation of due process even though these people did not testify. The Defendant has quoted a number of cases saying that in certain states persons working as social workers may be determined to be agents of the state and that Miranda would have to be given. This argument was not raised in Defendant's Motion to Dismiss or her Memorandum in support therefore. The question of whether a judge properly ruled upon an evidentiary objection, based on Miranda, is moot because the people did not testified and is moot when a mistrial is declared on other grounds.

It is not sufficient for a party to simply move to dismiss an information based on "constitutional grounds". (CF 54) The Motion refers to

the Memorandum and states that "and for other reasons set forth in Defendant's Memorandum". The Memorandum simply claims that the reason for the appeal is "double jeopardy, prosecutorial vindictiveness and failure to provide adequate discovery" (CF 64). Double jeopardy has its own constitutional basis (Article I, Section 12). Objection on the basis of prosecutorial vindictiveness and failure to provide adequate discovery do not signal an intention to preserve an issue on due process grounds. A party must make a specific objection or run the risk of losing the ability to bring it on appeal. In *Jones v. Cyprus Plateau Mining Corporation*, 944 P.2d 357, 359 (Utah 1997), a party objected to a jury instruction by simply stating that it misstates the law. The Court stated:

> "Because Cyprus's objection to Instruction 41 was not adequately preserved for appeal due to the lack of specificity in its initial objection, we need not rule on whether the instruction was correct. Under Utah law, objections must be raised with sufficient specificity at trial for the trial judge to have a legal basis for altering or rejecting the instruction."

Similarly, in *State v. Winward*, 941 P.2d 627, 633 (Utah Ct. App. 1997), a criminal case in which the defendant was being tried for sexual abuse of a child, the defendant had some objection to a prosecutor's questioning and to statements made in a closing argument, but simply objected on relevance grounds, did not renew the objection in the prosecutor's closing, and did not ask for a curative instruction, the Court stated:

> "A contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claims on appeal. Importantly, the grounds for objection must be distinctly and specifically stated. Quoting *State v. Johnson*, 74 P.2d 1141, 1144 (Utah 1999); quoting *State v. Tillman*, 570 P.2d 546, 551 (Utah 1987).

In *State v. Irwin*, 924 P.2d 5, 7 (Utah Ct. App 1996), a sexual abuse case, the question arose as to whether the prosecutor had breached a plea agreement by failing to stand moot at sentencing.

> "It is a well established rule that a defendant who fails to bring an issue before the trial court is generally barred from raising

> it for the first time on appeal. Quoting *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994); *State v. Archambeau*, 820 P.2d 920, 922 (Utah App. 1991).

In *State v. Burns*, 98 Utah Advance Report 32, 2000 WL 868493, 1, 3 (Utah June 2000), a case in which a person convicted of murder was appealing the State's denial of expert assistance unless a legal services counsel was representing the person, the Court stated:

> "It is true that an appellate court generally will not review any issue that was not raised in the court below. . . Accordingly in *Cunningham* we declined to address a statute of fraud's issue because the plaintiff had not raised it before the trial court. It was first raised in a post-trial memorandum. See *Cunningham*, 690 P.2d at 552, Note 2. Furthermore, in *Giles* we declined to reach the issue of attorney's fees because the issue was not raised until appeal. See *Giles* 657 P.2d at 289."

Defendant did not raise any due process claims in her motion or memorandum. Defendant's memorandum states that they are basing their grounds for requesting the Court to dismiss the Amended Information on double jeopardy, prosecutorial vindictiveness and failure to provide adequate discovery. The Motion simply states "upon constitutional grounds". This is not specific enough to preserve the issue of due process as it has not been set forth in the Defendant's pleading or argument. While the cases cited deal mainly with issues raised during trial, the same applies to Defendant's Motion to Dismiss. The issue of due process needed to be raised in specific terms in order to be preserved.

II

DOUBLE JEOPARDY DOES NOT BAR THE PROSECUTION OF THIS DEFENDANT IN A SECOND INFORMATION.

The Utah Constitution at Article I, Section 12, states "nor shall any person be twice put in jeopardy for the same offense". Utah Code Annotated §76-1-403 states in pertinent part:

> "(4). . . however termination of the prosecution is not improper if: a)the defendant consents to the termination; or b) the defendant waives his right to object to the termination; or c) the court finds, and states for the record, that the termination is

> necessary because (i) it is physically impossibly to proceed with the trial and conform with the law; or (ii) there is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or (iii) prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state . . . "

Numerous Utah cases have addressed the issue of double jeopardy as it applies to the Utah and Federal constitutions. Many of those cases, in recent years, have quoted *State v. Ambrose*, 598 P.2d 354 (Utah 1979). The underlying proposition is that a defendant is entitled to have a verdict rendered by a particular tribunal unless there is some manifest necessity for having that right removed. In *Ambrose* the Utah Supreme Court said that the discharge of a jury without a verdict operates as an acquittal unless (1) the defendant consents to the discharge or (2) legal necessity requires the discharge in the interest of justice. *Id.* at 358. This philosophy was taken from the case of *United States v. Journ*, 400 U.S. 470, 485 (1970) where the court explained:

> "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution even if the defendant's motion is necessitated by prosecutorial or judicial error."

The court will find in each of these cases that in order to bar a retrial there must be bad faith conduct by the judge or prosecutor. This legal rational has also been followed through the federal system and is stated in a case of *United States v. Dinitz*, 424 U.S. 600, 607-608(1976), where it states:

> "The state may usually retry an accused if he procures the declaration of a mistrial; however, the double jeopardy clause bars retrial where bad faith conduct by a judge or prosecutor is intended to provoke a mistrial request, and thereby allow the state an additional opportunity to convict the defendant."

The authorities generally hold that if a defendant asks for a mistrial he waives any defense he might otherwise assert based upon double jeopardy even though the prosecution provoked the error. State *v. Jones*, 645 P.2d 656, 657 (Utah 1982) quoting *State v. Ambrose*.) Thus, the holding in *Jones* stated:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching a motion by the defendant for mistrial is ordinarily assumed to remove any barrier of reprosecution even if the defendant's motion is necessitated by prosecutorial or judicial error."

In our case the Defendant sought the mistrial based upon her allegation of surprise in the charging document. Defense Counsel did not know that the Saturday following Thanksgiving (November 28), and Sunday night before the victim left the home (December 6), were two different incidents, even though the reports distinctly separate them and Counsel had reviewed both, but thought they were the same day. (Transcript 36-37, 116, 118, 145-146, 150-151)

The Court, aware of the holding in *Ambrose* went to great lengths to determine if the Defendant understood the import of her request for a mistrial. (Findings CF 227) Ultimately, the Defendant sought and received a mistrial (Transcript 159-161). There was no indication of bad faith or that the prosecutor had withheld discovery or sought a mistrial to obtain a better result. (Findings CF 227; CF 184) There was no indication of prosecutorial or judicial error.

The State does not dispute that jeopardy had attached to the charge of child abuse alleged to have occurred on or about the 28th day of November, 1998, because the jury had been empaneled, the first witness had been sworn and the Court began to take evidence. However, it does not necessarily follow that since a mistrial has been declared that the retrial on the same charge is barred. In *State v. Musselman*, 667 P.2d 1061, 1065-1066 (Utah 1983) the court stated:

> "It is not however necessarily true that a retrial is barred by the double jeopardy clause in all cases once jeopardy has attached . . . When a **defendant's** motion for a mistrial is granted, the jury is unable to reach a verdict or a conviction is reversed on appeal for errors of law in the trial of the case, a defendant may be retried not withstanding the double jeopardy clause. Quoting *E.g., Lee v. United States*, 432 U.S. 23 (1977); *State v. Jaramillo*, 25 Utah 2d 328, 481 P.2d 394 (1971); *State v. Gardner*, 62 Utah 62, 217 P.2d 976 (1923); see *United States v. Scott*, 437 U.S. 82 (1978) (Scott held that where a **defendant** "seeks to terminate the trial before a verdict on grounds unrelated to factual guilt or innocence" i.d. at 87 the double jeopardy clause does not bar retrial.)(Emphasis added)

In the case of *State v. Trafny*, 799 P.2d 704, 709 (Utah 1990) the defendant seeking a dismissal on double jeopardy grounds tried to established the prosecutor had shown bad faith by not providing portions of lab reports in a rape case. In *Trafny* the court stated:

> "If a defendant seeks a mistrial he waives any defense he might otherwise assert based upon double jeopardy even though the prosecution or the court provoked the error unless it can be shown that the bad faith conduct by the judge or prosecutor is intended to provoke a mistrial so as to afford the prosecution a more favorable opportunity to convict." Id. at 709.

The court, in *Trafny*, failed to grant the request of the defendant for a dismissal on double jeopardy grounds because the court stated:

> "In the instant case there is no indication that the prosecution intentionally or in bad faith withheld any of the lab reports in order to cause a mistrial, thereby improving the chances of conviction in a new trial."

The court required the record reflect bad faith on the part of the prosecution by intentionally withholding exculpatory evidence in order to provoke a mistrial to gain some tactical advantage in order for a dismissal on double jeopardy grounds to be allowed.

It appears from the case law that the Defendant, to succeed with her double jeopardy argument, must show three things: 1) that there was "bad faith" by the judge or prosecutor and motive to provoke a more favorable trial in order to 2) afford the prosecution a more favorable opportunity to convict. *State v. Jones*, 645 P.2d 656, 657 (Utah 1982), and 3) if a defendant seeks a

mistrial he generally waives any defense he might otherwise assert based upon double jeopardy, even though the prosecution or the court provoked the error. *State v. Rudolph*, 970 P.2d 1221, 1232 (Utah 1998) quoting *State v. Trafny*, 799 P.2 704, 709 (Utah 1990). As was the case in *Rudolph*, the defense in this case must demonstrate that the prosecutor provoked the mistrial and further that the prosecution did so intentionally so as to provide a more favorable opportunity to convict.

The Court found no bad faith on the part of the Prosecutor or the defendant (Transcript of Proceeding on Motion to Dismiss (Tr. MTD) p.21, et seq.):

A. In making the charges (Tr. MTD p. 21)

B. In providing discovery (Tr. MTD p.21)

C. In not determining earlier that the incidents occurred over 8 days (Tr. MTD p.23)

The prosecutor made every effort to complete the trial and to proceed with the jury upon the charging document before the court. The Prosecutor asked the Court to make a finding on the motive of the Prosecutor to provoke a mistrial. The Court said (Tr. MTD p.24):

> "I just don't think there's any basis in the record for that. It was clear to me that the prosecutor very definitely did not want a mistrial and was very much inclined to go forward. . . But what I believe is that the prosecutor just didn't want to have to do this twice. It's miserable enough doing it once. He was willing to take his chances of losing the case the first time around. That's what I was seeing in the courtroom. I was seeing a prosecutor that wanted to go forward - very much wanted to go forward, even though he might - he might have some advantages from coming back with a second trial with two counts."

The Court very specifically, "very pointedly", (Tr. MTD p.20) asked Defense counsel and Defendant if this was their desire to move for a mistrial after admonishing them that it may not be in the Defendant's interest (Transcript 159-161). The Defendant has failed to establish bad faith, a motivation on the part of the prosecutor to retry the case or that a retrial

would provide a more favorable opportunity to convict. The Defendant requested the mistrial with full knowledge of the consequences and has, according to Utah law, waived her right to contest a retrial on double jeopardy grounds.

III

DISCOVERY

A. DEFENDANT'S OBJECTION FOR FAILURE TO PROVIDE DISCOVERY IS UNTIMELY.

Rule 12(b) of the Utah Rules of Criminal Procedure states:

> "Any defense, objection or request, including requests for ruling on admissibility of evidence which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised **at least five days prior to the trial:**
>
> . . . (3) Requests for Discovery where allowed;"

The statement that the Prosecutor failed to comply in providing any materials relating to video tapes or transcripts is untimely. The Defendant was notified that video tapes existed. It is stated in both the report of Officer Kelly Bradford (Transcript 186) and in the Answer to Request for Discovery (Transcript 187) that video or audio tapes exist. This was provided in advance of the trial of the matter. within three days of the request. If the Defendant had concern that some materials (transcripts) were not provided she had an obligation pursuant to Rule 12 to raise the issue with the Court at least five days prior to the trial.

B. THE PROSECUTION PROVIDED ALL DISCOVERY MATERIAL; THERE WAS NO DISCOVERY VIOLATION.

The Defendant, mostly through innuendo, asserts that the State failed to provide discoverable information. This point is refuted by the Court in the Findings (Transcript 228, Findings paragraph 5) where the Court found that there was no bad faith on the part of the Prosecutor with regard to discovery and that there was no violation of discovery. Going to the Court record, it

is made clear that the material the Defendant continually stated was withheld by the Prosecution never existed. No case law or statute has required law enforcement officers to transcribe taped statements. If those materials (transcripts) do not exist, the State is not required to manufacture them.

It was clear from the Court's findings on motions presented at the trial that the State asserted on several occasions that a transcript did not exist, yet the Defendant continues to raise a question with regard to the Prosecutor's integrity by inferring that the reports exist, but that the Prosecutor claimed there were no reports. (Defendant's brief p.21)

This should not be a confusing issue for the Defendant. It was explained clearly on several occasions that those persons whom the State intended to have testify, being Mr. Webb and Mr. Hatch, did not prepare independent reports; their notes and observations were included in the report of Chris Veach:

> "Mr. Collins: The other problem I have, Your Honor, is that I have gotten no reports from these people that have supposedly done the interviews. I have a report, once again, Chris, that summarizes what supposedly happened. But I have nothing from those gentlemen who are going to testify. If there are such reports I ask that they be reproduced so I can review them before they testify.
>
> The Court: Well?
>
> Mr. Halls: Your Honor, there are no such reports. I think in talking with Robert Hatch he made some notes and I don't, I don't have those notes and I don't think Mr. Collins is entitled to those notes. So what I have is, basically his notes were included in Ms. , in Chris Veach's reports, which he has gotten."

The issue was again raised in the Motion hearing on February 23, 2000, where the State indicated to the Court that no transcript existed. Yet the Defendant continues to allege or infer that because they didn't have a transcript of that interview that the State was somehow withholding it. The Prosecutor stated that Mr. Webb and Mr. Hatch reported to Chris Veach and their findings were included in her report. The Prosecutor stated:

"They made no reports; there is no report; there still is no report.

The Court: Transcript or report, Mr. Halls?

Mr. Halls: There is a report in Chris Veach's statement. There is no transcript. They didn't make, they didn't make a separate report. They reported to the case worker, Chris Veach, and it is in her document that they received." (Tr. MTD p.6)

Mr. Collins again questions the integrity of the Prosecutor in his argument where he states:

"The Court asked counsel whether or not there was no report or whether or not there is no transcript. That question never got answered; which is a question I would like to know about. In other words we are told they videotaped the victim, the alleged victim in this case, but were not told whether or not there is a transcript of that.

We're told that apparently, and I don't know this to be a fact, but is seems like apparently the interview with the defendant was also taped, but we're told that we don't know that there was a transcript of that. Just that these folks were going to get up and testify to something she said, having made no notes, having made no reports, having made no reporting, apparently, but never having a transcription of it. So that seems interesting that we don't . . .

The Court: I thought I got an answer, Mr. Collins.

Mr. Collins: I'm sorry.

The Court: I thought I did get an answer.

Mr. Collins: What? Is there a transcript or isn't there? I didn't understand.

The Court: No, he didn't give you a reading. Is there a transcript?

Mr. Halls: Well, then, Mr. Collins, here today -

The Court: Hang on, do you want to know if there is a transcript - of what?

Mr. Collins: Of either the video tape or the interview, taped interviews.

The Court: Is there a transcript of either the video tape or the taped interviews?

Mr. Halls: See, here is another mischaracterization. I did not say there was a video tape or the interview between Mr. Hatch and Mr. Webb.

> The Court: You know, it would just help if you would just say there wasn't a tape of it. Is there a tape?
>
> Mr. Halls: There is a tape. There's a video tape of an interview with the victim.
>
> The Court: Okay. Is there a transcript of that video tape?
>
> Mr. Halls: No.
>
> The Court: Thank you.
>
> Mr. Halls: And I don't, and there is not a video tape of the other interview. It's basically these people's notes as given notes or understanding as given to Ms. Veach.
>
> The Court: Okay. (Tr. MTD p. 13-15)

The State's response to the Defendant's discovery requests indicates that the Prosecution fully complied. There is nothing in the record which indicates that there was any material withheld from the defense. The Defendant quotes the case of *State v. James*, 858 P.2d 1012 (Utah App. 1993) for the proposition that the court not requiring that statements be recorded, "inferred" the importance of recording certain statements. In fact, the Court in that case indicated that some problems which occasionally arise with regard to statements could be averted if recorded. But there was and is no requirement that the investigating officers for the state record certain types of statements. Defendant then "bootstraps" from this case to a conclusion on page 23 of her brief where she states "at a minimum Defendant was entitled to a report in advance of trial by these two (2) CPS workers so that she could prepare to meet their testimony". Defendant would have been entitled to receive that material if there had been a transcript of such statement. Since a transcript did not exist, the Defendant is not entitled to receive from the prosecution, materials which do not exist. The Court found no discovery violation at all. (Tr. MTD p.21)

In the case of *State v. Carter*, 707 P.2d 656, 661-662, the Court analyzed Utah Code Annotated §77-35-16, a statutory provision which has since been codified as Rule 16 of the Utah Rules of Criminal Procedure. This was a

case in which the defendant had formally requested discovery and the prosecution had made all of their materials available to the defendant by giving him the case file. The specifics of what one of the witnesses informed the prosecution he knew just prior to trial were not given to the defense. The Court in analyzing the statute covering discovery violation reviewed the first five points of the statute (now Rule 16) which states:

> "Except as otherwise provided the prosecutor shall **disclose** to the defense upon request the following material or information of which he has knowledge: (1) relevant written or recorded statements of the defendant or co-defendants; . . . (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense. . ." (Emphasis added)

The rule requires the prosecutor to **disclose** material and information of which he has knowledge. If certain information does not exist because it has not been produced in some form, it is not the obligation of the prosecutor's office to produce a transcript of a video tape because that is the medium the Defendant would like to view and work from.

C. NOTIFYING THE DEFENDANT THAT SHE MAY OBTAIN A COPY OF THE VIDEO TAPE FOR A FEE DOES NOT VIOLATE DISCOVERY RULES OR THE UTAH CONSTITUTION.

The State answered Defendant's discovery request on October 15, 1999 in response to a telephone request for discovery made on October 12, 1999, by providing all of the prosecution's file material. (Transcript p. 187-188)

At paragraph 4 of the State's Answer to Request for Discovery, the prosecutor notified the Defendant of video and audio interviews by stating:

> "There is a video and cassette tape of interviews of the victim. Copies can be reproduced for a fee. Please advise if you want copies made."

Defendant asserts that such a statement violates the Utah Constitution at Article I, Section 12, by compelling the Defendant to advance money or fees

to secure the rights provided by Article 12. The Defendant asserts that such tapes may contain exculpatory information which could have been used as a tool to cross-examine the victim. (Defendant's Brief p.26) While these assertions may be true, nothing prevented the Defendant or her counsel from coming to the Prosecutor's office and viewing the tapes for that, or any other purpose.

Rule 16 provides that it is the prosecutor's responsibility to "disclose" materials to the defendant. Further, Rule 16 (5)(e) states:

> "When convenience reasonably requires the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places."

Nothing requires the State to pay for these materials. Defendant was represented by counsel of her choosing. Defendant never made any motion or representation to the Court that she was indigent. Nothing in the discovery rules requires the prosecution stand the cost of providing discovery of photographs, video tapes or other materials to a defendant. If the Court is to take the assertion of the Defendant on this issue to its logical conclusion, the prosecution would be obligated to pay all of the Defendant's costs in pursuing her defense, which may include subpoenaing her own witnesses or even paying her attorney fees. The Court has certainly not indulged or conceded defendants this point. In the recent case of *State v. Burns*, 2000 WL 868493 (Utah June 2000), a case in which a defendant was denied the help of an expert witness where the defendant was not using the legal defender's association (LDA) counsel. The Court, in analyzing under what circumstances a person could obtain the assistance of an expert, reviewed statutory authority which provides that cities, counties and other government entities must make provisions for the adequate defense of indigents under U.C.A. §77-32-1 (now codified at §77-32-301:

> "Nothing in Section 77-32-1 conditions expert assistance on the appointment of state-funded counsel . . . Furthermore, it is clear from the plain language of that section that a county must provide the investigatory and other facilities necessary for a

> complete defense **to every indigent person**, not just to those represented by the LDA. . . . The only deciding factor of eligibility for this type of assistance are that the defendant in a criminal case be indigent and that the investigatory and other facilities be necessary to a complete defense." Id. at 6
>
> "Furthermore, Rule 15 of the Utah Rules of Criminal Procedure provides that 'upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense the witness fee shall be paid as if he were called on behalf of the prosecution.' Quoting Utah Rules of Criminal Procedure 15(a)[FN 5) There is no indication in this rule that a defendant must be represented by LDA to qualify for this assistance. Instead, the only prerequisite for eligibility are financial inability to pay and necessity for an adequate defense. It follows therefore that the only requirement for receiving public assistance for expert witnesses are proof of necessity and establishment of indigence." *Burns,* Id. at 6.

It is the State's contention that while the *Burns* case dealt with the provision of expert help, the same reasoning applies to the request by any defendant that the State fund the cost of copying video tapes. It is simply not the responsibility of the State to pay the costs of Defendant's defense except under the criteria as set forth in *Burns*, namely that the Defendant establish her indigence and secondly, that she establish that the materials sought were necessary for an adequate defense. The Defendant was represented by her own counsel and at no time ever made the assertion of being indigent. The State is not responsible for providing copies of video tapes at the State's expense. Notice to Defendant that material pertinent to the case is available does not "compel" any action on the part of the Defendant. It discloses the existence of material that the Defendant should then evaluate to determine its usefulness to their defense.

IV

PROSECUTORIAL VINDICTIVENESS

A prosecutor's duty is to see that justice is done. This means that a prosecutor should be fair in his dealings, but there is nothing which says that a prosecutor cannot be zealous, committed or even aggressive in the pursuance of the prosecution of a case. A defendant is not entitled to a

"mellow or docile" prosecutor, but in any event the allegation of prosecutorial vindictiveness can be belied by this observation. The prosecutor in this case sought to include all incidents from November 28 through December 6 into one count. Had the case gone through to a verdict and the defendant been convicted, she would only have one child abuse conviction on her record. It is the defense in this case that insisted that the prosecution could not proceed, to the point of requesting a mistrial. The defense insisted that the incidents were separate and that they hadn't had opportunity to prepare for both. A mistrial having been declared, the prosecutor is faced with a decision as to whether the matter should be filed as a single incident or as two. Is the prosecution required to ignore the assertions of Defendant that this is not one criminal episode and choose which count to prosecute or take the simpler approach of just separating the counts?

The trial court, in referring to the issue of vindictiveness, after observing all of the proceedings stated:

> "And I don't see vindictiveness here . . . I don't, don't find that you've acted in bad faith . . . I don't think it's vindictive to file two charges. I actually heard evidence that might be tampering with evidence and the prosecutor hasn't filed that. So I don't see that there's an attitude of vindictiveness towards the defendant." (Tr. MTD 23)
>
> "The Court: Well, the girl testified that there was a tape that she was - - she had a tape where she was surreptitiously taping what Ms. Nebeker was doing and Ms. Nebeker says 'You're not gonna get that', pulled the stuff up . . .
>
> Mr. Halls: She also testified, at the same time, that the mother had made some comment to her about never bringing a charge or taking it to court . . .
>
> The Court: . . . Yeah. That's what I was thinking. That other might have been tampering with a witness. I'm not saying they're terrific cases. I'm just saying that if I had an over zealous prosecutor here, I'd expect to see those charges filed, at least." (Tr. MTD 24-25, Findings 7, Transcipt 229)

Defendant refers to statements that additional allegations "may be looked into". In the preparation of the case several of the victim's family

members approached the prosecutor and indicated that they had been abused by the defendant while they lived with her. The prosecutor indicated they could provide the appropriate information and it would be determined if additional charges would be brought. It is a part of a prosecutor's duty, when informed of possible criminal activity, to invite the person to proceed to the point of determining whether a crime has been committed. A statement that the prosecutor will conduct his duty is no evidence that he acted maliciously or in bad faith or that there was any retaliatory motivation. It is actually an indication of exactly the opposite. The State has been unable to find any Utah cases on this issue; neither did the Defendant provide any Utah cases.

CONCLUSION

The Defendant failed to preserve her Due Process argument when she failed either at trial or in the Motion to Dismiss to raise a claim of Due Process as an issue.

Double Jeopardy is not a bar to reprosecution because the Defendant moved the Court for the mistrial and hereby waived their claim to raise double jeopardy, even if the prosecution or court provoked the error. The Defendant has failed to show any bad faith on the part of the State or court to provoke a mistrial to provide a more favorable opportunity to convict.

The Defendant was given all discovery prior to trial, which included notification that video and audio tapes existed. The Defendant's failure to object or request transcripts pursuant to Rule 12(b) precludes the issue being raised on appeal. However, there weren't any additional materials to be produced. There was no discovery violation.

The State is not required to fund discovery of defendants except where the statutes require it, i.e., indigent defendants. This Defendant never claims indigency and had her own attorney. Notice of the availability of material does not "compel" Defendant to reproduce it. She could have view the material at the presecutor's office to determine its usefulness to her case.

The Defendant has made no case whatsoever for a claim of prosecutorial vindictiveness. The Court found that the prosecutor made every effort to see the trial to its conclusion and that evidence at trial showed that a witness tampering charge was possible, but not brought. The filing of the Amended Information charging two separate counts is not vindictive.

Based upon the foregoing, the State requests the Court deny Defendant's claim for relief and find against Defendant in each particular asserted by her. The matter should be remanded to the District Court for trial on the amended information.

DATED this 6th day of September, 2000.

CRAIG C. HALLS
Attorney for Appellee

CERTIFICATE OF DELIVERY

I hereby certify that I mailed two copies of the foregoing Reply Brief to attorney for Appellant, C. Robert Collins, 10801 North 32nd Street, Suite 3, Phoenix, AZ 85028, this 6th day of September, 2000, postage prepaid.

ADDENDUM

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Article I, Section 12 [Rights of accused persons.]:

"In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the country or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband , nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Code Annotated Section 76-1-403(4):

"There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been empaneled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) The defendant consents to the termination; or

(b) The defendant waives his right to object to the termination;

(c) The court finds and states for the record that the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with the law; or

(ii) There is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) The jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial.

Utah Rules of Criminal Procedure 12(b)(3);

"Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion. The following shall be raised at least five days prior to the trial:

. . . (3) requests for discovery where allowed;. . .

Utah Rules of Criminal Procedure 16(a):

"Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
(1) relevant written or recorded statements of the defendant or codefendants;
(2) the criminal record of the defendant;
(3) physical evidence seized from the defendant or codefendants;
(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

Utah Code Annotated Section 77-32-301:

"Each county, city and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:
. . . (3) provide the investigatory resources necessary for a complete defense; . . .